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No. 80-589

In the Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF MANASSAS PARK AND
UPPER OCCOQUAN SEWAGE AUTHORITY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

ANTHONY J. STEINMEYER
C. FREDERICK GEILFUSS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether the federal government is liable under a grant contract for the increased cost of construction resulting from the grantee's compliance with a regulation promulgated by the Environmental Protection Agency pursuant to the Clean Water Act, 33 U.S.C. 1251 *et seq.*

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	6

TABLE OF CITATIONS

Cases:

D. R. Smalley & Sons, Inc. v. *United States*, 372 F.2d 505, cert. denied, 389 U.S. 835	4-5
Eastport S.S. Corp. v. *United States*, 372 F.2d 1002	4
Hatzlachh Supply Co. v. *United States*, 444 U.S. 460	4
Texas v. *United States*, 537 F.2d 466	5
United States v. *Spearin*, 248 U.S. 132	5
United States v. *Testan*, 424 U.S. 392	4

Statutes and regulation:

Clean Water Act Amendments of 1972, 33 U.S.C. 1251 *et seq.*:	
33 U.S.C. 1281 *et seq.*	1
33 U.S.C. 1281-1284	1
33 U.S.C. 1282(a)	2
33 U.S.C. 1283(d) (Pub. L. No. 93-243, Section 2(d), 87 Stat. 1069)	4
Va. Code §§ 15.1-1239 *et seq.* (1973)	1
40 C.F.R. 35.903(a) (1973)	2, 4

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-6a) is not reported.

JURISDICTION

The judgment of the Court of Claims was entered on July 16, 1980. The petition for a writ of certiorari was filed on October 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

Title II of the Clean Water Act, 33 U.S.C. 1281 *et seq.*, authorizes the Environmental Protection Agency to fund 75% of the cost of construction of qualifying publicly-owned sewage treatment works. See 33 U.S.C. 1281-1284. In 1972, petitioner Upper Occoquan Sewage Authority ("UOSA") submitted plans to EPA for a construction grant regarding a new sewage treatment plant and pumping facilities.[1] Preliminary engineering reports for the project estimated that the combined facilities would cost $49.3 million. Because there were insufficient funds allotted to Virginia in fiscal years 1973 and 1974 to cover the cost of the project in any one year, UOSA's plans divided the project into three segments that were to

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[1] Pursuant to the Virginia Water and Sewer Authorities Act, Va. Code §§ 15.1-1239 *et seq.* (1973), four Virginia municipalities, including petitioner Manassas Park, created UOSA for the purpose of constructing and operating a sewage treatment plant. In the Court of Claims, the government argued that Manassas Park and the other municipalities are not proper parties to this suit. The court below did not reach this claim (Pet. App. 6a).

be funded over several years. The three segments were the plant itself, five new pumping stations, and the interceptor sewer lines and force mains (Pet. 3-4; Pet. App. 2a-3a).

At that time, EPA's regulations provided that no grant would be authorized except with regard to the "fabrication and building of a complete and operable treatment works." 40 C.F.R. 35.903(a) (1973). This regulation was designed to ensure that in the event of a subsequent termination or reduction in federal funding, earlier grants would not have been wasted on an unusable facility. Because each of the three segments of UOSA's initial plan was not a complete and operable treatment works, EPA rejected the grant application. Thereafter, UOSA redesigned its construction plan so that each step would constitute a complete and operable treatment works.[2] Allegedly as the result of these design changes, the cost of the total project rose to $82.28 million. EPA subsequently approved these plans and awarded grants totaling $55.5 million or approximately 75% of the project's cost, as required by 33 U.S.C. 1282(a). See Pet. 4-5; Pet. App. 2a-3a.

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[2] The new UOSA plan proposed that the construction be carried out in the following three phases:

Phase I. Construction of most of the proposed force mains and new interceptor sewer lines, pumping stations, and plant head works.

Phase II. Construction of additional interceptor sewer lines, remaining portions of the plant proper, final effluent reservoir, sludge dewatering equipment and carbon regeneration facilities.

Phase III. Construction of the remaining interceptor sewer lines and the waste handling system for the plant proper.

In 1979, UOSA and the four municipalities serviced by the UOSA treatment works filed this suit for damages in the Court of Claims. Petitioners claimed that the United States is liable for their portion (25%) of the approximately $33 million increase in cost allegedly attributable to EPA's unlawful requirement that each grant contract cover a complete and operable facility. In addition, petitioners contended that EPA's regulation breached the implied warranty of the grant contract by rendering the contract commercially impracticable and unreasonable.

The Court of Claims granted the government's motion for summary judgment. The court first observed that in light of its limited jurisdiction, petitioners' claim must necessarily be founded upon a contract, here the grant agreement (Pet. App. 4a).[3] The court further concluded that there is no equitable basis for reforming the grant contract and that, by the express terms of the contract, the government promised only to pay for 75% of the cost of construction (*id.* at 4a-5a). The court also held that EPA had made no implied warranty regarding the commercial practicability of the contract plans, particularly since it was petitioners who had furnished those plans (*ibid.*).

ARGUMENT

Petitioners do not suggest that EPA failed to pay 75% of the cost of their sewage treatment project or otherwise failed to adhere to the express terms of the construction grant. Rather, petitioners contend (Pet. 5-8) that the government is liable for more than 75% of the project's cost because EPA

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[3] Petitioners did not contest this point (Pet. App. 4a).

allegedly imposed an unlawful condition on the construction project and because EPA breached an implied warranty of commercial practicability. The Court of Claims correctly rejected these claims, however, and that decision does not conflict with any decision of this Court or of any court of appeals. Furthermore, because the EPA regulation that gives rise to this case has been superseded by statute,[4] the precise issues presented here have no prospective significance. Accordingly, further review by this Court is unwarranted.

In any event, as the court below held, the government was not liable for any excess cost incurred by petitioners as the result of EPA's operable unit policy, even if that policy was an improper interpretation of the Clean Water Act.[5] UOSA was not required to enter into a grant contract, but rather voluntarily chose to do so, even though it was fully aware that existing federal regulations required that the project be built in operable segments. That the cost of the project was perhaps made greater as a result of EPA's policy decision simply is not a basis for equitably reforming the contract or otherwise imposing liability upon the sovereign. See *D. R.*

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[4] In 1974, Congress amended the Clean Water Act to provide that each part of a project need not be an operable unit, as previously required by 40 C.F.R. 35.903(a) (1973). See Pub. L. No. 93-243, Section 2(d), 87 Stat. 1069, codified at 33 U.S.C. 1283(d).

[5] Petitioners recognize (Pet. 7) that their suit in the Court of Claims is limited to contract claims. See *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 n.5 (1980); *United States* v. *Testan*, 424 U.S. 392, 400-402 (1976); *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002 (Ct. Cl. 1967).

Smalley & Sons, Inc. v. *United States*, 372, F.2d 505, 507 (Ct. Cl.) cert. denied, 389 U.S. 835 (1967). As the Court of Claims pointed out (Pet. App. 3a-4a), EPA's allegedly unlawful policy falls far short of constituting duress, fraud, or any other basis for allowing petitioners to avoid the express terms of the grant contract. Cf. *Texas* v. *United States*, 537 F.2d 466, 470-471 (Ct. Cl. 1976).

Relying on *United States* v. *Spearin*, 248 U.S. 132 (1918), petitioners further contend (Pet. 6-7) that EPA's operable segment policy breached an implied warranty of commercial practicability. It is well settled, however, that ordinarily the government is liable only for breach of *express* undertakings in a grant contract. See *Texas* v. *United States*, *supra*, 537 F.2d at 470-471; *D. R. Smalley & Sons, Inc.* v. *United States*, *supra*, 372 F.2d at 507. *Spearin* is not to the contrary. In that case, liability was imposed on the government acting as a purchaser because its plans and specifications, which had been relied on and followed by the contractor, proved to be defective. In contrast, here petitioners and not the government developed and supplied the plans and specifications. Hence, "[i]f any party warranted that [the plans] were commercially practicable, it would seem [to] have been [petitioners]" (Pet. App. 5a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

ANTHONY J. STEINMEYER
C. FREDERICK GEILFUSS
Attorneys

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